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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Newspaper/Radio Cross-Ownership Waiver Policy	)	MM Docket No. 96-197
	)	

To: The Commission

COMMENTS OF ABC, INC.

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COMMENTS OF ABC, INC.

ABC, Inc., a wholly owned subsidiary of The Walt Disney Company, submits the following comments in response to the Notice of Inquiry in the proceeding specified above, FCC 96-381, released October 1, 1996 ("Notice"):

Introduction and Summary

As the Notice indicates, the standards that currently govern waivers of the newspaper/broadcast cross-ownership rule are stringent. Absent a showing that the viability of one or both of the relevant enterprises is at stake, there are few circumstances in which those standards would permit the creation of a new cross-ownership or the preservation of an existing one upon assignment or transfer. See id. ¶¶ 3-5. The question raised in this Inquiry is whether there are grounds for relaxing this policy in the case of newspaper/radio combinations and, if so, what form the relaxation should take.

We show in point I of these comments that the answer to the first question is emphatically "yes." While the rule seeks to preserve both diversity and competition, its principal objective is the promotion of diversity. Notice, ¶ 3. When it adopted the rule in 1975, the

Commission recognized that the putative harm to diversity caused by newspaper/radio cross-ownership was small. Today, any such concerns are even further removed. There are now many circumstances in which the desirability of avoiding government restraints on efficiency and innovation far outweighs the remote and conjectural gains in diversity that might be achieved by preventing a newspaper/radio combination or forcing a divestiture.

Indeed, in recent years the Commission has properly relaxed other cross-ownership restrictions that the 1975 Commission itself acknowledged as parallel. When it adopted the newspaper/broadcast rule, the Commission stressed that it was treating the acquisition of radio stations by newspaper owners exactly as it treated the acquisition of radio stations by the owners of television stations: Both were forbidden to acquire radio stations in their markets. That can no longer be said. The Commission now permits television/radio cross-ownership in a great many cases. It has never placed any restrictions on cable/radio cross-ownership. There is no justification for a regulatory structure that virtually bans newspaper/radio cross-ownership in precisely the same circumstances.

We show in point II of these comments that relaxation of waiver policy should, to the extent feasible, follow the model of the Commission's radio/TV cross-ownership rule. Waivers should presumptively be granted for transactions that meet a "30 Voices" or "Top 50 Markets/30 Voices" standard. Where -- but only where -- this standard is not met, the Commission should weigh the effects of the transaction upon diversity and competition against any countervailing benefits to the public.

The use of a presumptive standard for waiver would promote clarity and consistency in the application of the Commission's waiver criteria, without foreclosing the consideration of circumstances that argue against waiver even where the presumptive test is met. At the same time, the adoption of such a test would eliminate any need, in cases where the standard is met, for the Commission to engage in a case-by-case balancing of the slight theoretical harm to diversity or competition against specific public benefits promised by the applicant.

A "30 Voices" or "Top 50 Markets/30 Voices" test would be fully appropriate in light of the analogous presumptive standard for waiver applied under the radio/TV cross-ownership rule. Moreover, given the wide range of advertising vehicles available in the larger markets and the low levels of concentration that are likely, such a test should be used to resolve presumptively both the diversity and the competitive issues raised by cross-ownership, as the analogous test is used under the radio/TV rule.

Finally, application of the presumptive test should not be affected by the number of radio stations proposed for cross-ownership. If the overall number of media owners whose voices are available to the public is sufficient to satisfy diversity concerns, the number who speak through radio is immaterial. So, too, given the range of competitive alternatives available to advertisers, cross-ownership between a newspaper and the maximum number of radio stations that antitrust authorities and the Commission would allow to be owned in common would not pose any significant threat to competition.

We show in point III of these comments that, in applying the presumptive test we propose, the Commission should define both the range of media to be counted and the relevant geographic area by reference to its primary objective -- to ensure that a proposed cross-ownership would leave the public with an ample number of competing media "voices." Pursuant to that objective, the Commission should count equally all daily and weekly newspapers, television stations, radio stations and cable channels that have the capacity to act as local outlets for the area served in common by a proposed newspaper/radio combination.

That area in turn should be defined by reference to the typical characteristics of newspapers and radio stations. Metropolitan central-city newspapers should be deemed to serve their principal areas of circulation. Metro-area radio stations should be deemed to serve the Arbitron metro area in which they operate. The overlap of these two areas should define the area served in common by two such cross-owned media. Other relevant media with the capacity to act as sources of information and opinion on the issues local to that area -- e.g., radio stations in the Arbitron metro area, television stations in the Nielsen Designated Market Area (DMA) and daily or weekly papers or cable channels available in the area of concern -- should be counted as "voices."

This analysis also applies when the newspaper is published in one of the central cities of a hyphenated market. Although such papers may concentrate their marketing efforts on one portion of the overall metropolitan area, the Commission recognized in 1975 that the radio (as well as the television) stations in such a market function as local outlets for all of the market's central cities. Indeed, all radio stations in the Arbitron metro area, all television stations in the DMA and all daily or weekly papers or cable channels available in the metro area should be counted as "voices" in this context.

A similar analysis applies when a suburban daily is cross-owned with a central-city metropolitan radio station. The residents of suburbs often care as deeply about metropolitan issues as they do about those peculiar to their suburbs. In very substantial degree, they rely upon central-city media for information and opinion. Those media in turn have strong incentives to devote coverage to the special concerns of the suburbs in which a majority of their audience now typically resides. Moreover, where a particular cross-ownership links a suburban daily with a central-city radio station, the *only* conceivable effect of that link upon the diversity of sources available to the suburb is a reduction in the number of the independently owned *metropolitan* media that serve it. All such media should therefore be counted in assessing the diversity effects.

Cross-ownership between a "satellite-city" daily (located outside of any metro area) and a radio station similarly located does call for a different approach. The role of central-city media can reasonably be discounted in this context. But such circumstances are exceptional and should not govern Commission policy generally.

In point IV of these comments, we show that, where -- but only where -- the presumptive test we propose is not met and the Commission engages in a case-by-case weighing of diversity and competitive effects, there is a need to define both geographic and product markets for competitive, as well as for diversity, purposes. We propose the standards we outline in point III for diversity purposes. Those standards, however, may not always be appropriate for purposes of competitive analysis. For that purpose and as a general matter, the Arbitron radio metro area would appropriately define the geographic market That is plainly the case where cross-ownership links a metropolitan daily with a central-city radio station. The same is true where a central-city station is linked to a suburban newspaper. Only where both media are located outside of any metro area would a narrower geographic market be appropriate.

Finally, there is substantial evidence that any product market broad enough to contain newspapers and radio stations will necessarily include a wide range of other advertising vehicles.

These include, at a minimum, cable systems, television stations, direct mail, Yellow Pages, weekly papers, outdoor advertising and point-of-purchase displays.

I. There Is Compelling Reason to Relax Newspaper/Radio Waiver Policy

When it established the newspaper/broadcast rule in 1975, the Commission recognized that there was little diversity or competition to be gained from the ban on newspaper/radio combinations, given the multiplicity of radio stations then operating in many markets.[1/] The Commission nonetheless thought that "even a smaller gain" was "worth pursuing,"[2/] despite the possibility that cross-ownership could facilitate efficiency and innovation.[3/] The traditionally restrictive policy on waivers of the rule has reflected that judgment.

The balance that the Commission struck in 1975, however, has been severely undermined by subsequent developments. The startling growth in local media choices, as the Commission has acknowledged, has mandated the relaxation of many of the ownership restrictions then in place -- including the national ownership limits for television and radio, the local radio/TV cross-ownership rule and the radio duopoly rule.[4/] Maintenance of a more restrictive policy on

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1/ Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 FCC 2d 1046, 1075, recon., 53 FCC 2d 589 (1975) ("1975 Rule"), aff'd sub nom. FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) ("FCC v. NCCB").

2/ Id.

3/ See 50 FCC 2d at 1064.

4/ Multiple Ownership of Standard, FM, and Television Broadcast Stations, Report and Order, 100 FCC 2d 17, recon., 100 FCC 2d 74 (1984) ("National Ownership"); Broadcast Multiple Ownership Rules, Second Report and Order, 4 FCC Rcd 1741, recon., 4 FCC Rcd 6489 (1989) ("Radio/TV Ownership"); Revision of Radio Rules, 7 FCC Rcd 2755, recon., 7 FCC Rcd newspaper/radio combinations is simply not tenable. Indeed, there is no sound remaining basis for the distinction that the Commission's policies now make between the ability of newspaper owners, television station owners and cable system owners to acquire or construct radio stations in their own markets.

A. Relaxation is Warranted by the Growth of Local Media Choices

The Notice mentions the 46% increase in the number of radio stations since 1975, but immediately contrasts that growth with the 11% decline in the number of daily newspapers. Id. ¶ 9. This mode of analysis ignores the enormous growth in local electronic media, as well as the abundance of local print media published on less than a daily schedule, all of which must be taken into account in any assessment of the trends in media diversity and competition.[5/].

The decline in the number of daily newspapers since 1975 has been accompanied by an explosion in the number of competing local electronic media, including not only radio stations, but television stations and cable television services as well. The number of full power television

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6387 (1992), further recon., 9 FCC Rcd 7183 (1994) ("Radio Duopoly").

[5/] The Commission considered cable systems, weekly papers and a broad range of other media when it decided in 1989 that the state of diversity and competition in local broadcast markets warranted a relaxation of the radio/TV "one to a market" rule. See Radio/TV Ownership, 4 FCC Rcd at 1743. It regularly considers cable systems, weekly papers, and low power stations when it determines whether proposed waivers of that rule in smaller markets will unduly reduce diversity. See, e.g., Greater Muskegon Broadcasters, FCC 96-423 ¶17, released Oct. 25, 1996 (LPTV stations); Illinois Valley Broadcasters, FCC 96-384 ¶ 13, released Sept. 27, 1996 (weekly papers); Westar Broadcasters Group, 11 FCC Rcd 11221, 11226 ¶ 14 (1996) (weekly papers); Kelso Partners IV, 11 FCC Rcd 8764, 8768 ¶ 11 (1996) (weekly papers).

stations (commercial and noncommercial) has increased by 63.9%, from 949 in 1975 to 1555.[6] Low power television stations did not exist in 1975; today there are 1,954.[7]

In 1975, moreover, only 10 million households (roughly 14.2% of the total) subscribed to cable;[8] as late as the end of 1977, national cable penetration was only 17.1% of TV homes and only 32.1% of TV homes were passed by cable.[9] Today, national cable penetration stands at 71.9% and estimates of TV homes passed range from 94.5 to 96.7% of total TV homes.[10] Thousands of cable television systems provide PEG and leased access channels that function as local sources of information and viewpoints, independent of the cable operator's editorial control.[11] Many provide local or regional news channels that are independent of local broadcasters or newspapers.[12]

6/ See 41 FCC Ann. Rep. 17 (1995); Broadcast Station Totals As Of December 31, 1996, FCC News, Jan. 21, 1997.

7/ See Notice of Inquiry, BC Docket No. 78-253, 68 FCC 2d 1525 (1978); Broadcast Station Totals As Of December 31, 1996, FCC News, Jan. 21, 1997.

8/ See Television & Cable Factbook, 1996 Edition, at F-2; Cable Television Syndicated Program Exclusivity Rules, Notice of Proposed Rule Making, Dockets Nos. 20988 & 21284, 71 FCC 2d 1004, 1014 (1979).

9/ Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television, Report, Docket No. 21284, 71 FCC 2d 632, 664 Table 1 (1979).

10/ NTI, 1996-97 Universe Estimates; Nielsen Cable On-Line Data Exchange (as of 11/22/96); Kagan Media Index, 10/31/96; NCTA, Cable Television Developments, Fall 1996; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, FCC 96-496, released Jan. 2, 1997, Appendix B, Table 1 (providing year-end 1995 estimates).

11/ See Television & Cable Factbook, 1996 Edition at F-2.

12/ See Broadcasting & Cable, Aug. 12, 1996 at 61 ("Rainbow to launch Philadelphia news channel"); id., Jan. 15, 1996 at 128, 1996 WL 8289134 ("Blizzard boon to local cable news channels"); Multichannel News, Nov. 6, 1995 at 42, 1995 WL 10032569 ("CAB goes to D.C. to

Diversity in the print media is also far from moribund. For a decade or more after 1975, the number of weekly newspapers declined in tandem with the number of dailies. Since 1987, however, weeklies have experienced vigorous growth; in 1995 their numbers (9,011) exceeded those of 1975 (8,824).[13/] Weekly papers often serve smaller suburban communities (or city neighborhoods) that may lack daily papers of their own.[14/] And a significant part of the recent increase in their number reflects the rise of "alternative" newsweeklies,[15/] which avowedly seek to express viewpoints at odds with those of the "establishment" media.[16/]

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woo political advertisers"); Broadcasting & Cable, May 8, 1995 at 46, 1995 WL 7938872 ("Following the sun; launching news channels in Florida, Arizona, and Seattle").

[13/] See Statistical Abstract of the United States, 1982-83 at 561 Table No. 951; Statistical Abstract of the United States, 1995 at 579 Table No. 917; see also Sheppard, "The Strength of Weeklies," 18 Am. Journalism Rev. 32 (1996).

[14/] In the Washington, D.C. metropolitan area, for example, weekly papers are published in Arlington, Fairfax, Bethesda, Chevy Chase, Falls Church, Gaithersburg, Greenbelt, Herndon, Laurel, McLean, Reston, Rockville and Springfield, as well as many other suburban communities. SRDS, Community Publication Advertising Source, May 1996, at 49-58.

[15/] The Association of Alternative Newsweeklies ("AAN") was founded in 1977 with some 15 initial member papers. As of October 3, 1996, excluding Canadian papers, it had 101 members publishing weeklies in 88 large and small cities. Thirteen of the weeklies had circulations of 100,000 or more; an additional eight had circulations of 80-100,000. Source: AAN.

[16/] AAN bylaws currently require that an applicant for membership (i) publish a paper of "general interest" (rather than "a publication with a narrow concentration on subjects including but not exclusively, music, entertainment, religion, the environment or a political party or organization"), (ii) not be owned by "a daily newspaper publishing company or its affiliate," and (iii) publish a paper that provides "a positive editorial alternative to mainstream journalism." Source: AAN. See also "Riverfront Times: Ads vs. Content," AAN News/November 1996 at 7 (reprinting article from the St. Louis Journalism Review that lists six instances, suggested by readers, in which the Riverfront Times has taken on substantial local issues that were being neglected by the mainstream press); Gleick, "Read All About It," Time Magazine, Oct. 21, 1996 at 66, 69 (". . . a number of alternative weeklies are stepping in where older papers, sensitive to charges of negativity, have let their role as community watchdog slide. * * * New Times's

It is apparent, we submit, that even the residents of smaller cities and towns now have access to a broad range of media outlets. Those that reside in the larger metropolitan centers have an enormous array of such media from which to choose for coverage of local issues and affairs.[17]

In these circumstances, the ownership consolidation in the commercial radio industry made possible by the Telecommunications Act of 1996 does not argue against a general relaxation of waiver policy.[18] If the community served by a proposed newspaper/radio combination will have a plethora of competing media voices, including daily and weekly newspapers, television stations, cable channels and radio stations, the number of radio owners that will serve it is irrelevant. Concerns that the latter number may be declining in some communities should not deter the Commission from proceeding with a general relaxation of policy that is plainly warranted.

B. The Current Disparity in the Treatment of Newspaper/Radio, Television/Radio, and Cable/Radio Cross-Ownerships Cannot Be Justified

There is yet another, and compelling, reason to relax the Commission's policy. In 1975, the Commission recognized that "there is no basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership." 1975 Rule, 50 FCC 2d at 1075. It

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Westword kept dogged watch over the start-up problems at the Denver International Airport last year, while the dailies, the Denver Post and the Rocky Mountain News, were less critical. And the Phoenix New Times beat that city's dailies on the corruption scandals of Governor Fife Symington III").

[17] We have not even attempted to provide quantitative data on a variety of other media that provide information and opinion on significant local issues. Consider, for example, local magazines (e.g., The Washingtonian).

[18] See Notice, ¶ 9.

asserted, however, that "[n]ewspapers as a class are not barred or subjected to discrimination" by the prospective rule, since television station licensees were also barred from obtaining a radio station in their local market areas. 1975 Rule, 53 FCC 2d at 592.

This comparability of treatment is central to the viability of the Commission's traditional newspaper/radio waiver policy. In upholding the prospective ban against attack under the First Amendment and the Equal Protection clause, the Supreme Court grounded its conclusions on the fact that "the regulations treat newspaper owners in essentially the same fashion as other owners of the major media of mass communications were already treated under the Commission's multiple ownership rules," i.e., "owners of radio stations, television stations, and newspapers alike are now restricted in their ability to acquire licenses for co-located broadcast stations." FCC v. NCCB, 436 U.S. at 801. Indeed, the Court found that Grosjean v. American Press Co., 297 U.S. 233 (1936), "in which this Court struck down a state tax imposed only on newspapers, is thus distinguishable in the degree to which newspapers were singled out for special treatment." Id.

None of these statements can now be made. The 1989 relaxation of the radio/TV "one to a market" rule, which is now to be expanded pursuant to the Telecommunications Act of 1996, has created a great many circumstances in which a television owner is able to acquire a radio station in its own market (or vice versa) but a newspaper owner is not. Further, as the Commission pointed out in 1989, there has never been any restriction on cross-ownership between a radio station and a cable television system.[19]

There is no justification for this discrimination against newspaper owners as a class.

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[19] Radio/TV Ownership, 4 FCC Rcd at 1746.

While television stations, cable systems and daily newspapers differ in many ways, no one has suggested any characteristic of newspapers as a class that would justify limiting their ability to acquire radio stations more severely than that of television station or cable system owners. There is no factual ground for a belief that newspapers have greater "weight" or "influence" in the local marketplace of ideas. In any case, presumed disparities in the relative influence of different media should be deemed irrelevant.[20/]

Since there is no "special characteristic" that justifies singling out newspapers for special burdens, there is doubt whether the newspaper/radio ban could now survive constitutional scrutiny.[21/] But the question need not in any case turn on constitutional concerns. There is compelling reason, as a matter of sound policy and reasoned decisionmaking, for the Commission to relax a waiver policy that discriminates irrationally against a particular class of speakers.

II. The Commission Should Adopt a "30 Voices" or "Top 50 Markets/30 Voices" Standard

Both the traditional policy under the newspaper/broadcast rule and the policy embodied in the radio/TV rule recognize as grounds for waiver circumstances that put in doubt the economic viability of a medium proposed for cross-ownership.[22/] The radio/TV rule, however,

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20/ As the Commission remarked in 1984, ownership restrictions founded on a belief that particular media have "unique power to influence or persuade, and therefore to manipulate, the nation's political process" would be constitutionally suspect. National Ownership, 100 FCC 2d at 20.

21/ See Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 660-61, 114 S.Ct. 2445, 2468 (1994).

22/ See Fox Television Stations, Inc., 8 FCC Rcd 5341 (1993), aff'd sub nom., Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154 (D.C. Cir. 1995); 47 CFR §

also presumes that waiver is appropriate when the market is sufficiently large and the number of remaining independently owned broadcast voices is sufficiently great to make any harm to diversity and competition slight. Where -- but only where -- this standard is not met, the Commission engages in a case-by-case balancing of potential harms to diversity and competition against specifically proposed efficiencies and other benefits to the public.

The Commission should follow that model here.[23/] It should waive the rule to preserve the economic viability of a medium proposed for cross-ownership. It should also define a level of local diversity and competition at which the theoretical harm of cross-ownership is sufficiently slight to make its potential contributions to efficiency and innovation at least presumptively controlling. We propose for this purpose a "30 Voices" or "Top 50 Markets/30 Voices" test, which should resolve competitive (as well as diversity) issues and should apply without regard to the number of radio stations proposed for cross-ownership.[24/]

73.3555 Note 7.

[23/] The Commission is now considering, among other things, the complete elimination of the radio/TV cross-ownership rule. Second Further Notice of Proposed Rule Making, MM Docket Nos. 91-221 & 87-7, FCC 96-438 ¶¶ 63-64, released Nov. 7, 1996 ("Second Further Notice/ TV Ownership"). If it should take that course, elimination of all newspaper/radio restrictions would also be appropriate. Such action, however, would be beyond the scope of this proceeding, which is limited to a consideration of waiver policy for newspaper/radio combinations.

[24/] Where this test is *not* met, it would be appropriate for the Commission to require a more concrete showing of the absence of harm to diversity and competition, and in instances where such harms are thought to exist, a showing of public benefits sufficient to outweigh them. See, e.g., Kargo Broadcasting, Inc., 5 FCC Rcd 3442 (1990) (showing of public benefit held inadequate to warrant waiver in light of applicant's ownership of major local media).

A. The Commission Should Adopt a Standard Defining Cases in Which Waiver Would Presumptively Be Appropriate

A presumptive waiver standard such as the one employed under the radio/TV rule has several virtues. It promotes clarity and consistency in the Commission's waiver standards.[25] Moreover, the Commission is not foreclosed from considering (on its own motion or on petition) facts peculiar to the individual case that might undermine the presumption favoring waiver when the standard is met. At the same time, where the standard is met, the Commission need not engage in a case-by-case balancing of the slight theoretical gain in diversity or competition that might be produced by enforcing the rule against specific public benefits promised by the applicant if a waiver is granted.[26]

That result is fully warranted. As the Commission has recognized, the knowledge of a community that an owner gleans from operating one medium is likely to make that owner an efficient operator of a second medium in the same community.[27] A rule that prevents the community from reaping the benefits of that knowledge harms the public. In cases where enforcing such a rule will produce only negligible public benefit, there is no reason to cause this kind of harm.

Further, the public stands to gain if cross-owned media are allowed to experiment with different modes of synergy that may be beneficial to the public, even though quantification of the benefits may be difficult or impossible. Consider, for example, the potential synergies between a

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25/ See Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990).

26/ See Radio/TV Ownership, 4 FCC Rcd at 1751 ¶ 77, 1752 ¶ 85; Guy Gannett Publishing Co., 7 FCC Rcd 1787, 1788-89 (1992).

27/ See Guy Gannett Publishing Co., 7 FCC Rcd 1787, 1789 (1992).

daily newspaper and a broadcast station in the provision of interactive "Internet" services. Cross-ownership can facilitate the emergence of such synergies.[28] The Scripps-Howard newspaper and TV station in Cincinnati are now experimenting in this vein,[29] and ABC's WBAP(AM) and the Fort Worth Star-Telegram have taken initial steps down the same road by establishing a variety of links between their respective home pages. Where any conceivable adverse consequences of cross-ownership are remote, there is every reason for the Commission to encourage this kind of experimentation.

B. A "30 Voices" or "Top 50 Markets/30 Voices" Standard Would Be Appropriate

We propose a "30 Voices" or "Top 50 Markets/30 Voices" standard to define cases in which waiver is presumptively appropriate. Pursuant to Section 202(d) of the Telecommunications Act of 1996, the Commission is now considering the extension of its "30 voices" policy under the radio/TV rule to the top 50 markets.[30] We agree with those who argue that market rank is ultimately irrelevant to the central issues, which should turn on the number of

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[28] See Williamson, The Economic Institutions of Capitalism (1985); Williamson, Markets and Hierarchies (1975); Veraldi, Carpooling on the Information Superhighway: The Case for Newspaper-Television Cross-Ownership, 8 St. Thomas L. Rev. 349 (1996).

[29] See Williams, "Post/WCPO partnership may be wave of future," Cincinnati Business Courier, July 19, 1996, 1996 WL 10040483 ("What's different here is that Cincinnati is among a handful of U.S. media markets in which newspaper and television outlets, by virtue of being under single ownership, can pool resources without having to negotiate thorny strategic-alliance deals with other media companies").

[30] The Commission has noted in this regard that its experience in passing upon waiver requests beyond the top 25 markets "indicates that application of the 30 independently owned voices test to the Top 50 markets should also be sufficient to safeguard diversity and competition in markets 26-50." Second Further Notice/TV Ownership, ¶ 66.

independent media enterprises that would remain if a given cross-ownership were allowed.[31/] But if a market rank criterion is retained, the "top 50 markets" standard is plainly appropriate for newspaper/radio, as well as TV/radio combinations.[32/]

There is force, moreover, to arguments that considerably fewer than 30 independently owned voices would suffice to protect both diversity and competition.[33/] When the Commission adopted the "Top25/30 Voices" standard for radio/TV combinations, it recognized that this standard was "conservative" and "may far exceed the market size and the number of voices necessary to ensure diversity and prevent competitive abuse."[34/] If the Commission reduces the number of voices required under the radio/TV rule, it should take parallel action here. At a minimum, there is no warrant for any more restrictive test.

31/ See Second Further Notice/TV Ownership, ¶ 68.

32/ In this case, we submit, the Commission should employ the Arbitron rankings of radio metro areas, rather than the Nielsen rankings of TV DMA's.

33/ See Second Further Notice/TV Ownership, ¶ 71 (noting such proposals under the radio/TV rule).

34/ Radio/TV Ownership, 4 FCC Rcd at 1751.

C. The Suggested Standard Should Be Deemed to Resolve Both Diversity and Competitive Concerns

When it adopted the "Top 25/30 Voices" standard for waivers of the radio/TV rule, the Commission found that this standard would both safeguard diversity and prevent competitive abuse.[35/] Accordingly, the Commission does not engage in a separate analysis of the competitive effects of a particular cross-ownership when it finds that this standard has been met.[36/] That approach is appropriate here as well.

At the outset, concentration in the larger geographic markets (where thirty or more voices can be found) is likely to be low. The Commission's Notice suggests the contrary. It cites the 49% share of local advertising revenues captured by newspapers in 1995 and asserts that, in most cases, such a share will be captured by a single newspaper.[37/] If valid, these suggestions would imply that most geographic markets in which newspapers compete with other advertising media are "highly concentrated" for purposes of competitive analysis.[38/]

35/ Radio/TV Ownership, 4 FCC Rcd at 1752.

36/ Where the Commission treats cross-ownership case-by-case, it considers competitive effects when it evaluates the type of facilities involved and the overall effects on diversity and competition. Id. at 1753; see Stockholders of Infinity Broadcasting Corporation, FCC 96-495 ¶¶ 41-46, 86-90, released Dec. 26, 1996 ("Infinity"); Repp WWBB, G.P., FCC 96-463 ¶ 6, released Nov. 27, 1996; S.E. Licensee, G.P., FCC 96-464 ¶18; released Nov. 27, 1996; Shareholders of Citicasters, Inc., 4 Comm. Reg. 898, 904-06 ¶¶ 22-23 (1996).

37/ Notice, ¶ 20, citing McCann-Ericson estimates published in Advertising Age, May 20, 1996 at 22.

38/ Standing alone (i.e., without regard to the shares of other competitors), the 49% share would produce an HHI -- computed by summing the squares of the relevant market shares -- of 2401. Under Section 1.51 of the Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines ("1992 Horizontal Merger Guidelines"), a market in which the HHI exceeds 1800 is "highly concentrated," and mergers producing an increase of more than 50 points in HHI "potentially raise significant competitive concerns."

The focus on local advertising alone, however, is misplaced. To a substantial degree, national and local advertising are substitutable for each other (from both a supply-side and a demand-side perspective). If the price of local advertising rises relative to that of national advertising, local media have an incentive to sell more of their advertising inventory to local advertisers and national advertisers have an incentive to purchase more national advertising themselves (replacing some of the local advertising purchased by their retail outlets).[39/] Hence, shares of total local and national advertising combined more accurately reflect the alternatives available to both local and national advertisers. Both the Commission and the Department of Justice now focus on shares of combined local and national advertising revenues when assessing concentration in local radio markets.[40/] There is no ground for a different approach to the analysis of concentration in the broader market in which newspapers and radio stations compete.

For these reasons, the relevant share of newspapers in 1995 was their 27.6% of total advertising sold by local outlets.[41/] But even that figure overstates the role of newspapers. For it omits the $12 billion expended in 1995 on point-of-purchase advertising.[42/] Inclusion of that

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39/ See Economists Incorporated, An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules, filed May 17, 1995, MM Docket No. 91-221, vol. 1 ("Owen, MM Docket No. 91-221") at 32-34 (noting, inter alia, that in 1995 McDonald's and its franchisees made such a shift from local to national advertising).

40/ See, e.g., Infinity, ¶¶ 59 & 62; U.S. Department of Justice, Competitive Impact Statement filed Nov. 14, 1996 in United States v. Westinghouse Electric Corp. and Infinity Broadcasting Corp., Civil No. 1:96CV02563 (Antitrust), U.S. District Court, D.C.

41/ Total advertising revenues, for this purpose, are the McCann-Ericson estimates for 1995, excluding specialized media and media that provide only national exposure, i.e., national magazines, farm publications, television and cable networks, television syndication (UPN, WB and barter ads), radio networks and business papers.

42/ The Reuter Business Report, March 18, 1996 (reporting estimate by the Meyers Research Center and the Point of Purchase Advertising Institute).

obvious alternative for local and national advertisers would reduce the newspaper share to 25.3%.[43/] Even if such a share is typically captured by a single newspaper, its size strongly suggests that most advertising markets are unconcentrated and would remain unconcentrated (or become, at most, moderately concentrated) in the presence of newspaper/radio cross-ownership.[44/]

In sum, concentration in the larger geographic markets where thirty or more voices can be found is highly likely to be too low to make newspaper/radio cross-ownership a cause for concern.[45/] Moreover, the conditions in such advertising markets are in any case hostile, rather than conducive, to any form of coordinated interaction among sellers to the detriment of buyers. The pricing of advertising in broadcast and other media is influenced by a complex array of factors; there is no common measure of the level of advertising prices across different media; the prices paid by particular advertisers to particular media are not publicly disclosed; and the price levels that would maximize profits -- which depend on, e.g., price elasticities of demand for advertising and margins of prices over variable costs -- will differ for different media and for

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[43/] That share estimate is itself conservative, for it omits any consideration of promotional activities that substitute for advertising. See Owen, MM Docket No. 91-221 at 18-19 & Appendix D at D-27-28.

[44/] For an explication of this point, see Appendix A, attached hereto. Under Section 1.51 of the 1992 Horizontal Merger Guidelines, a market with an HHI below 1000 is regarded as unconcentrated. Indeed, a market with an HHI between 1000 and 1800 is regarded as only moderately concentrated; mergers in such a market that do not produce an increase of more than 100 points in HHI are deemed "unlikely to have adverse competitive consequences."

[45/] In Radio/TV Ownership, the Commission found that "the 'top 25 markets/30 voices' standard represents a degree of competition sufficiently robust so that the markets involved would be unconcentrated or moderately concentrated, assuming that the HHI could be properly measured." 4 FCC Rcd at 1752. The same finding could be made with regard to the standard we propose for waivers of the newspaper/radio restriction.

individual competitors. Such conditions would make tacit price coordination virtually impossible and "cheating" on any informal agreement both easy and attractive.[46/] Hence, even where concentration in one of the larger markets might atypically be higher than we have suggested, there would be little reason to fear anticompetitive coordination.

There would be equally little reason to fear unilateral exercises of market power by a newspaper/radio combination. The products offered to advertisers by different media exhibit differences in mode, targetability, timing and effectiveness for different purposes. In a market that is highly differentiated in this fashion, significant unilateral effects are to be anticipated from a merger if (i) post-merger market concentration data suggest a potential problem under standard antitrust criteria, (ii) the merging firms have a combined market share of at least thirty-five percent, and (iii) a significant share of purchasers regard the merging firms' products as the closest substitutes for each other.[47/] Even if a particular newspaper/radio combination did present some question with regard to concentration, it is highly unlikely that the other two conditions would be met.

Thus, several advertising vehicles are likely to be as close or closer substitutes for the radio stations or the newspaper than either is for the other. Direct marketing (direct mail) -- which delivers timely print advertising to the home -- competes more closely with daily newspapers than do radio stations.[48/] Similarly, cable television systems provide substitutes for

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46/ See Owen, MM Docket No. 91-221 at 34-36. Cf., 1992 Horizontal Merger Guidelines, §§ 2.1, 2.11 & 2.12.

47/ 1992 Horizontal Merger Guidelines, § 2.211.

48/ See Cameron, Nowak & Krugman, "The Competitive Position of Newspapers in the Local Retail Market," 14 Newspaper Research Journal 70 (1993) (surveys of small-market local newspaper advertisers showed direct mail as the principal competitive threat to radio stations as least as close as those provided by newspapers. The clustering of cable ownerships in particular markets, together with advertising interconnects between independently owned systems, allows cable to offer advertisers either area-wide or more localized exposure.[49/] Like radio, moreover, local cable systems offer advertisers a combination of low cost and an ability to target particular demographic groups (through ads inserted on one or more of the many specialized cable program channels).[50/]

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newspapers); Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1192-94 (3rd Cir. 1995) (local direct mail services arose in response to limits on the penetration of newspapers, and newspapers responded by offering to deliver advertising inserts to homes they did not otherwise reach); Morton, "Direct Mail: The Real Threat to Newspapers," American Journalism Review, Nov. 1, 1996, 1996 WL 12876056; Boehlert, "Battle in Beantown," Inside Media, Jan. 22, 1992, 1992 WL 11301971 ("'Our biggest competitor is direct mail,' insists CEO Taylor [of Affiliated Publications, Inc., publisher of the Boston Globe], 'We've lost ad shares to direct mail, not to the Herald.'").

[49/] See Katz, "Local Cable's Ace in the Hole: Digital Interconnection," Broadcasting & Cable, June 24, 1996, at 58, 1996 WL 8290588; Burgi, "Local Ad Sales: Getting It Together," Adweek (Eastern Edition), May 8, 1995, 1995 WL 7936131; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, FCC 96-496 ¶¶ 137-38, released Jan. 2, 1997.

[50/] See Boehlert, "Cable: Piranha or Partner?" Inside Media, Feb. 19, 1992, at 39, 1992 WL 11302043 ("As with radio sales, cable teams tout their medium's targetability and low out-of-pocket costs. * * * . . . the first budgets cable landed were ones that had been earmarked for radio"); Miles, "No Longer Static," Adweek (Eastern Edition), Sept. 13, 1993, 1993 WL 3215732 ("If radio doesn't shape up, warns Howard Nass, vp/local broadcast at Foote, Cone & Belding, cable will overtake it. 'It's a sleeping giant,' he says. 'It's everything radio is but with a picture.'"); Foisey, "Wall Street Tremors Cause Radio Daze," Broadcasting & Cable, April 18, 1994, at 32, 1994 WL 2928427 (reporting remark by media investment fund executive that cable operators would become more aggressive in pursuing advertising revenues, because of regulatory constraints on their charges to cable subscribers, and that "cable's main focus" would be on "attracting dollars from radio"); Ross, "Malone's Media Forecast," Inside Media, Aug. 2, 1995 at 18, 1995 WL 10025912 (interview in which John Malone is quoted as saying that TCI could reach a billion dollars in local ad sales in five years, given sufficient clustering of cable ownership in particular markets and/or use of cable interconnects, and that this "really would represent the cable industry moving from essentially competing with radio in a local market to competing with television in a local market").

Finally, in the typical situation suggested by the nationwide figures already discussed, a single newspaper (with a 25.3% share in 1995) would not obtain a combined share in excess of 35% even if it were to acquire *all* of the local radio stations (with a 7.6% 1995 share, computed on the same basis). And there is no practical likelihood that antitrust enforcement authorities or the Commission would permit such a radio acquisition by a newspaper or any other party.[51]

D. The Standard Should Apply Without Regard to the Number of Radio Stations Proposed for Cross-Ownership

The number of radio stations proposed for cross-ownership should not affect the application of the proposed standard. The critical question for diversity purposes is one of the number of independently owned media sources to which the public can turn -- not the number of radio stations controlled by any particular party. There is no diversity reason to make restrictions on newspaper/radio combinations turn on the number of radio stations involved.

The critical question for competitive purposes is whether the combination of a newspaper and multiple radio stations is more likely to produce competitive abuse than the combination of the same newspaper with one or two radio stations. Once again, the answer is negative. As already shown, concentration in the broad advertising product market where newspapers and radio stations compete is unlikely to be increased significantly by the addition of some fraction of radio's small share to that of a daily newspaper. Nor would cross-ownership of a newspaper and multiple radio stations create or facilitate the exercise of market power in any relevant submarket. The vigilance of antitrust authorities and the Commission should suffice to prevent

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[51] See Infinity, ¶¶ 59-62 (describing the market shares allowed in recent cases by antitrust authorities and the Commission).

a single owner from accumulating control over enough radio stations in a market to dominate the pricing of radio advertising (considered as a separate submarket). But even in that unlikely event, combination of that owner's radio stations with a co-located newspaper would not remove the important constraint on radio ad prices imposed by competition from cable television.[52]

In short, it is difficult to imagine any public interest reason why cross-ownership should be allowed for one or two radio stations and a newspaper, but not for the maximum number of radio stations that can otherwise be commonly owned. Indeed, this is the precise ground on which the Court of Appeals questioned the Commission's current view that the presumptive "Top25/30 Voices" standard should apply to cross-ownership between a television station and up to two radio stations, but that the more restrictive case-by-case approach should apply when more radio stations are involved. Neither the diversity nor the competition objective supplies a rational basis for such a distinction. See WSB, Inc. v. FCC, 85 F.3d 695, 701 (D.C. Cir. 1996).

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[52] See Hall, "Cable Seeing Green in Radio Mergers," Electronic Media, July 1, 1996 at 12, 1996 WL 7535181 (cable operators anticipate gains in advertising revenue if radio mergers lead to increases in radio advertising rates).